Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

JOHN GEORGE BROWN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
FREDERICK R. MILLAR, JR.
Supervising Deputy Attorney General
ROBERT M. FOSTER
Supervising Deputy Attorney General
Counsel of Record
110 West A St., Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2284
Fax: (619) 645-2271
Counsel for Petitioner

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(CAPITAL CASE)

QUESTION PRESENTED

1. In a death penalty case, must the conviction be reversed pursuant to this Court's holdings in Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), where the prosecution gives to the defense the final negative results of a blood analysis for drugs, gives to the defense a portion of the blood sample that was analyzed, and gives to the defense sufficient funds to make its own independent analysis of the blood, but fails to disclose a positive result of a preliminary screening test of the blood sample?

2. Has there been a "suppression" of evidence within the meaning of Brady, where the prosecution acts properly and sends a laboratory report to the defense, but through no fault of the prosecution, the report fails to reach the defense attorney?

LIST OF PARTIES

Arthur Calderon is the warden of San Quentin Prison, Tamal, California. He is represented in this litigation by Daniel Lungren, California Attorney General, and Robert M. Foster, Supervising Deputy Attorney General.

The defendant is John George Brown, an inmate sentenced to death under the laws of California. He was represented in the California Supreme Court by Michael M. Crain and Rowan K. Klein of Santa Monica, California.

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OPINION OR JUDGMENT BELOW

People v. Brown, 46 Cal. 3d 432, 758 P.2d 1135, 250 Cal. Rptr. 604 (1988), a published opinion by the California Supreme Court affirming Brown's judgment of conviction and death sentence. (Attached as App. A.)

In re Brown, 17 Cal. 4th 873, 952 P.2d 715, 72 Cal. Rptr. 2d 698 (1998), a published opinion by the California Supreme Court reversing the first degree murder conviction and death sentence. (Attached as App. B.)

In re John George Brown, 1998 Cal. LEXIS 3196 (1998), an order denying the California Attorney General's petition for rehearing. (Attached as App. C.)

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3), to review a judgment of the California Supreme Court which

was entered on April 2, 1998. The California Supreme Court denied a rehearing petition on May 20, 1998. The present Petition for Writ of Certiorari is filed within the required ninety day period following the final entry of judgment. The judgment of the supreme court became final for the purposes of this Court with the denial of the petition for rehearing by the California Supreme Court on May 20, 1998. Citizens Bank of Michigan v. Opperman, 249 U.S. 448, 449-50, 39 S. Ct. 330, 63 L. Ed. 701 (1919). Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

CONSTITUTIONS, STATUTES, OR REGULATIONS

5th AMENDMENT to United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On May 13, 1982, John George Brown was found guilty of the capital murder of Police Officer Donald Reed following a jury trial in the California state court. On June 11, 1982, the state court sentenced Brown to death.

On August 25, 1988, the California Supreme Court affirmed Brown's conviction and sentence following his direct appeal. People v. Brown, 46 Cal. 3d 432, 758 P.2d 1135, 250 Cal. Rptr. 604 (1988). Following the denial of certiorari by this Court, 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989), Brown filed a petition for writ of habeas corpus in the Federal District Court in the Southern District of California. Because the petition contained numerous unexhausted claims, the federal district court ordered Brown to return to state court to exhaust these matters.

After Brown filed his petition for writ of habeas corpus with the California Supreme Court, that court appointed a referee to take testimony and make certain factual determinations after a reference hearing. Following the filing of the report by the referee, the California Supreme Court issued an opinion on April 2, 1998, reversing, by a four to three vote, the first degree murder conviction and the death sentence of John George Brown. In re Brown, 17 Cal. 4th 873, 952 P.2d 715, 72 Cal. Rptr. 2d 698 (1998). The California Attorney General's petition for rehearing was denied on May 20, 1998. 1998 Cal. LEXIS 3196.

SUMMARY OF ARGUMENT

The California Supreme Court reversed this capital case by a four to three vote because the majority found that the prosecution had unintentionally failed to make certain that the defense had a copy of a laboratory report showing that one of the initial screening tests on Brown's blood was positive for PCP. The crime laboratory that performed the tests had sent the report of the initial screening test to the defense (the county public defender) through the county run mail system, but no copy was ever found in the defense files. It was undisputed that the prosecution had given the defense the results of the final blood tests that showed there was no detectable PCP in the blood and part of the blood sample tested by the county run laboratory, and the court had given the defense funding to perform its own tests.

Under this Court's holdings in Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the prosecution is under a duty not to suppress favorable, exculpatory material information from a criminal defendant. Kyles, 115 S. Ct. at 1567. The underlying rationale of these cases is "avoidance of an unfair trial to the accused." Brady explained that, "Society wins not only when the guilty are convicted but when criminal trials are fair." Brady, 373 U.S. at 87.

The majority opinion in this case by the California Supreme Court recognized and applied Kyles and Brady. But the majority opinion failed to apply a critical limitation to this rule that is well recognized by the federal courts. At least eight of the federal circuits have held that the government will not be found to have suppressed material information if that information was available to a defendant through the exercise of reasonable diligence. See, e.g., U.S. v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996), cert. denied, 117 S. Ct. 181,

136 L. Ed. 2d 120 (1996); United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980); United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983).

The holdings in these federal cases were premised on the rationale that since due process is a matter of fairness in the trial, there was nothing unfair about a trial where the prosecution had failed to disclose information that the defense had or had access to. These cases are thus based on the rationale recognized in Brady and its progeny. The decision of the California Supreme Court violates this rationale since there was nothing unfair or suppressed in Brown's case. As such, the decision violates the basic principles of Kyles and Brady.

Since Brown was given a sample of the blood, and was given the funds to have an expert perform an independent examination of the blood, the defense had the ability to perform its own screening tests and to learn of the positive reaction. Thus, the information was available to the defendant through the exercise of reasonable diligence. (In fact, although not reflected in the written opinion of the Supreme Court of California, the full record filed with that court shows that the defense did have other types of tests run on the sample of Brown's blood.) Thus, contrary to the ruling of the Supreme Court of California, there was no violation of the principles of either Kyles or Brady.

Moreover, where the prosecution does not suppress evidence, and acts in the manner demanded by Brady in that it discloses the evidence, the good faith actions of the prosecution should defeat a claim of a due process violation. The California Supreme Court erred by failing to recognize that under these facts there was no suppression of evidence and the prosecution acted in good faith.

The California Supreme Court misconstrued and misapplied this Court's holding in Kyles and Brady. This Court should grant certiorari in order to refine its Brady

jurisprudence consistent with the federal appellate courts and to correct the error in this capital case.

ARGUMENT

I.

SINCE THE DEFENDANT WAS GIVEN THE FINAL LABORATORY REPORT, GIVEN PART OF THE BLOOD SAMPLE TAKEN FROM HIM ON THE NIGHT OF THE MURDER, AND GIVEN SUFFICIENT FUNDS TO HIRE HIS OWN BLOOD EXPERT TO INDEPENDENTLY TEST THE BLOOD, THE FAILURE OF THE PROSECUTION TO ENSURE THAT THE REPORT OF THE PRELIMINARY BLOOD SCREENING TEST REACHED DEFENSE COUNSEL DOES NOT WARRANT REVERSAL OF HIS MURDER CONVICTION OR VACATING OF HIS DEATH SENTENCE

In this case, following Brown's arrest for the murder of a police officer, a blood sample was taken from him. The initial screening test on the blood was positive for PCP. This was based on a radioactive immunoassay test (RIA). As this is a preliminary screening test with a known record for false positive readings, following any positive RIA test, the accepted scientific procedure is to perform a more precise test using a gas chromatograph mass spectrometer (GC/MS). That test in this case was negative for PCP. Brown's defense team was given part of the blood sample taken from Brown on the night of the crime, was given the negative GC/MS test results, and was given sufficient funding to hire its own blood expert to perform independent tests.

The county crime laboratory that performed the blood tests sent a copy of the report of the positive RIA screening test to the defense attorney, and the county

public defender who is also a county employee. The report was not suppressed; it was disclosed. However, no copy of this report was ever found in the defense files and none of the defense attorneys could ever recall seeing it before or during trial.

Brown claimed that his failure to receive the positive RIA screening test violated this Court's holding in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Before resolving the legal issues, the Supreme Court of California appointed a referee and ordered him to make certain factual determinations. The referee (Judge Daniel J. Didier of the Orange County Superior Court) concluded that the prosecution had disclosed the positive RIA test result to the defense. He also found that the difference in the GC/MS and RIA results was attributable to the unreliability of the RIA test, which often reported the presence of PCP in blood samples in which no PCP was actually present.

The majority opinion of the California Supreme Court rejected each of these factual findings. It concluded that the prosecution failed to provide the RIA test result to the defense, and that the inconsistent test results, while possibly attributable to the limitations of the RIA test, may also have been attributable to other factors that would be consistent with the hypothesis that Brown was under the influence of PCP when he killed Officer Reed. Finally, it concluded that the undisclosed test result was "material"; that is, that the result "'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'". In re Brown, 17 Cal. 4th 873, 877-92, 952 P.2d 715, 72 Cal. Rptr. 2d 698 (1998), citing Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), n. omitted. Thus the, court declared that Brown's conviction and death sentence had to be vacated. Brown, 17 Cal. 4th at 892.

Even assuming arguendo that the California Supreme Court properly rejected the factual

determinations of its own referee, the court still misapplied this Court's decisions in Kyles and Brady. Even if the prosecution's disclosure efforts failed to get the positive preliminary blood screening test into the defense's hands, the prosecution did give the defense part of the blood sample taken from Brown on the night of the crime, it did give the negative GC/MS test results, and the trial court did give Brown sufficient funding to hire his own blood expert to perform independent blood tests. Thus, because Brown was afforded the means of obtaining the information he claims the prosecution failed to provide, his own lack of due diligence negates the prosecution's claimed omission. Thus, the trial was not unfair and there was no "suppression" of evidence under Brady.

Brown's own experts testified at the habeas reference hearing that it was known at the time of trial that PCP could exist in a person's blood at a level so low that it could not be detected by the GC/MS test. Brown had told his defense attorney that he had taken drugs on the night of the crime. Trial RT 2953-60, 2963, 2966, 2988-90. Thus, having the blood retested by an independent expert using the RIA test was clearly an action that could have been undertaken by the defense. Moreover, it is well known that the RIA test could detect lower levels of PCP than could the GC/MS at the time of these events in the 1980's. Retesting the crime laboratory's results so as to challenge the prosecution's case is a well recognized defense strategy. People v. Coleman, 46 Cal. 3d 749, 774 at n.18, 759 P.2d 1260, 251 Cal. Rptr. 83 (1988).

Indeed, although not reflected in the opinion of the Supreme Court of California, the full appellate record filed with that court shows that Brown's defense team did run certain other blood tests on its portion of the blood sample. For whatever reason, they chose not to run an RIA test on the blood. Performing an RIA test would be

the primary method for attacking the GC/MS test by trying to show that PCP was present at a level below the sensitivity of the GC/MS machine.

It is well settled in the federal courts that the government will not be found to have suppressed material information if that information was available to a defendant through the exercise of reasonable diligence. U.S. v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996), cert. denied, 117 S. Ct. 181, 136 L. Ed. 2d 120 (1996); United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980); United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983); U.S. v. Wilson, 901 F.2d 378, 380 (4th Cir. 1990); Lugo v. Munoz, 682 F.2d 7, 9-10 (1st Cir. 1982) [government has no Brady burden when facts are available to a diligent defense attorney]; U.S. v. Hicks, 848 F.2d 1, 4 (1st Cir. 1988) ["[G]overnment has no Brady burden when facts are readily available to a diligent defender"]; United States v. LeRoy, 687 F.2d 610, 618 (2nd Cir. 1982) ["Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence" (citations omitted)], cert. denied, 459 U.S. 1174, 103 S. Ct. 823, 74 L. Ed. 2d 1019 (1983).

As the Fifth Circuit stated in Brown:

> [R]egardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim.

Brown, 628 F.2d at 473.

As the Seventh Circuit aptly noted:

> When defendants miss the exculpatory nature of [evidence] in their possession or to which they have access, they cannot miraculously resuscitate their defense after conviction by invoking Brady.

U.S. v. White, 970 F.2d 328, 337 (7th Cir. 1992).

Even the Ninth Circuit has followed this rule. As that court wrote:

> When . . . a defendant has enough information to be able to ascertain the supposed Brady material on his own, there is no suppression by the government.

United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991).

Here, Brown was afforded sufficient information, funds, and opportunity to obtain the undisclosed information on his own. Accordingly, the failure of the report to reach Brown's counsel did not constitute suppression of exculpatory evidence within the meaning of Kyles or Brady.

Several state court cases have rejected claims of Brady violations where the defense had equal access to a blood sample and the funds to hire their own expert to challenge the prosecution's expert. For example, in Turner v. State, 684 N.E.2d 564, 1997 Ind. App. LEXIS 1252 (1997), the Indiana Court of Appeals held that the prosecution's failure to provide the defense with defendant's blood-alcohol test results did not constitute suppression of exculpatory evidence, because the state had provided the defense with a police log in which "blood test

call" had been written; the name of the investigating officer who had transported the defendant was on the charging information; and the defendant had testified that he remembered being transported to the hospital after his arrest. Turner, 684 N.E.2d at 568-69.

Similarly, in State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988), the Arizona Supreme Court held that where a defendant is given access to a portion of the blood taken from him and funds to perform his own tests on that blood, he cannot complain that the prosecution did not retain or give discovery of tests run on the blood. In Beaty, the state took blood samples from the defendant. From these samples, slides were made and a phosphoglucomutase (PGM) analysis was made. No photographs of the slides were taken, and the slides were destroyed. They were not given to the defense. The Arizona Supreme Court found that since a portion of the sample of the blood taken from the defendant had been given to the defense and since the defense had the ability to run its own independent tests, there was no denial of due process through the destruction of the slides used by the state's expert or the related failure to give them to the defense.

> Moreover, defendant was not denied the opportunity to impeach the state's expert or procedure, since defendant had an opportunity to independently analyze the samples and cross-examine the witness.

Id., at 528.

A similar finding should have been made in this case. There was no suppression of the critical laboratory report. Since this capital defendant was given the laboratory's final conclusion, given a portion of the blood sample taken from him on the night of the killing, and

given ample funds to hire his own expert, there was no suppression of the evidence. There was no denial of due process even if the prosecution unintentionally failed to ensure that the results of the preliminary blood screening test reached trial counsel. Moreover, the defense was aware, or should have been aware, that at the time Brown's blood was tested that the GC/MS test could not detect very low levels of PCP, but an RIA test might be able to do so. Based upon these factors, there is no reason the defense examination could not have included an independent RIA test, which would have provided the defense with the claimed Brady material. This truly is a case where the defense attorneys did "miss the exculpatory nature of [evidence] in their possession or to which they have access." They should not be allowed to "miraculously resuscitate their defense after conviction by invoking Brady." White, 970 F.2d at 337.

The prosecution's conduct of sending the results of the preliminary RIA blood screening test to the defense, but not ensuring their arrival, did not, therefore, constitute suppression of exculpatory evidence under the Brady doctrine. Consequently, the California Supreme Court misconstrued and misapplied this Court's decisions in Kyles and Brady. Under these facts there was neither suppression of evidence nor a violation of defendant's right to due process. Brown's trial was not unfair. This Court should grant this Petition for Writ of Certiorari.

II.

BECAUSE THE PROSECUTION DID NOT SUPPRESS THE LABORATORY REPORT AND SINCE THE PROSECUTION ACTED IN GOOD FAITH, AND SINCE THE NON-DELIVERY OF THE REPORT WAS CAUSED BY FACTORS OVER WHICH THE PROSECUTION HAD NO CONTROL, THERE WAS NO VIOLATION OF BRADY IN THIS CASE

In its opinion, the California Supreme Court acknowledged that the crime laboratory had sent the report of the preliminarily blood screening test to the defense through the county run mail system. Apparently it never arrived, or arrived and was lost by the Public Defender's Office support staff before it reached the attorney handling Brown's case. The California Supreme Court held that under such circumstances, regardless of the conduct of the prosecution, there had been a violation of due process.

> To that end, a document sent but not received is as useless as a document not sent at all. In both situations, the right to a fair trial is equally denied.

Brown, 17 Cal. 4th at 881.

By this ruling the California Supreme Court extended Brady and its progeny far beyond the limits set by this Court.

It is, of course true that in Brady, this Court held that:

> [S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady, 373 U.S. at 87, emphasis added.

But it is critical to note that in Brady and all of the cases subsequently decided by this Court, there was a failure by the prosecution to give, or even attempt to give, the document in question. See, e.g., Kyles, 514 U.S. at 419; United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). In all these cases, regardless of intent, the document in question had never left the custody of the prosecution.

But in the case at bar, the prosecution had acted in exactly the manner this Court envisioned in Brady. There was no "suppression." It had disclosed the document. By sending a copy of the report to the defense, the conduct of the prosecution met the exact disclosure requirements of Brady.

Through no fault of the prosecution, the report never reached the defense trial attorney. For this reason, the California Supreme Court applied Brady and reversed. But that court failed to realize that there is no additional conduct that the prosecution could have undertaken. It sent the report to the defense. Under these circumstances, where the prosecution engages in the proper conduct, its good faith conduct should be held to comply with Brady.

Had the report reached the actual trial defense counsel, there would have been no Brady issue. The prosecution's conduct would have been above reproach. But the conduct would have been exactly the same: the prosecution sent the report. Through the actions of individuals not in the control of the prosecution (either

the mail system or the defense counsel's clerical staff), conduct that was blameless became culpable for Brady purposes.

Where the conduct of the prosecution is unassailable and where the Brady violation is the result of third party conduct not under the control of the prosecution, the good faith of the prosecution should preclude a finding of a due process violation.

This Court has repeatedly recognized that good faith is a relevant consideration in dealing with evidence. For example, in United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971), this Court said that:

> No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.

Id., at 325.

See also, United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) [courts should not look behind the face of a warrant on which police have relied in good faith]. In this case, where there was no showing of any intentional act by the prosecution to not turn over the report, and where there was a showing of proactive governmental conduct, the good faith of the prosecution should preclude a finding of a denial of due process. There has been no "suppression" of evidence by the prosecution under such circumstances. Brady, 373 U.S. at 87.

Additionally, application of the Brady principles to the facts presented in this case is unwarranted because it makes the prosecution responsible for external factors beyond its control, such as the inner workings of the county mail system or opposing counsel's clerical staff. In

this case, the report of the preliminary blood screening test was sent to the defense. It never reached the actual trial attorney. It was either lost in the county mail system or lost by the office staff of the defense attorney. The holding by the California Supreme Court effectively makes the prosecution responsible for the conduct of both of these entities. The prosecution could behave in utter compliance with Brady but through the actions of third persons, over whom the prosecution has no control, a Brady violation could occur. Such a ruling makes the Brady obligation contingent on factors beyond the control of the prosecution. Where the prosecution does what Brady requires -- it discloses the evidence -- the failure of the defense to actually receive the material does not constitute "suppression" of evidence as defined or envisioned by Brady or its progeny.

CONCLUSION

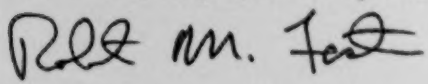
The Supreme Court of California misapplied this Court's decisions in Kyles and Brady. Since Brown was given the final results of the blood analysis, a portion of the sample itself, and sufficient funds to employ his own blood expert, the conduct of the prosecution in sending the report but not ensuring its delivery was not a violation of due process. Brown had access to this information with the exercise of reasonable diligence. He conducted other tests on the blood, and he reasonably could have conducted an RIA test. Moreover, since the conduct of the prosecution was in compliance with the mandate of Brady and its progeny, and since the non-delivery was caused by factors over which the prosecution had no control, the good faith conduct of the prosecution ensures there was no violation of Brady.

For the foregoing reasons, Petitioner respectfully submits that the Writ of Certiorari should issue to review the decision of the Supreme Court of California in this case.

Dated: August 14, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
FREDERICK R. MILLAR, JR.
Supervising Deputy Attorney General



ROBERT M. FOSTER
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

RMF:bjm
SD1994XH0001